IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KIMBERLY McMONAGLE	:	CIVIL ACTION
	:	
v.	:	
	:	
BENSALEM TOWNSHIP, et al.	:	NO. 97-3873

MEMORANDUM AND ORDER

HUTTON, J. December 11, 1997

Presently before this Court is Defendants' Motion to Dismiss (Docket No. 4). For the reasons stated below, the defendants' Motion is **GRANTED in part and DENIED in part**.

I. BACKGROUND

The plaintiff has alleged the following facts. At approximately 12:17 a.m. on June 7, 1995, the plaintiff was driving a car on Street Road. Pl.'s Compl. ¶ 16. She was alone in her vehicle. Id. ¶ 18. Bensalem Township Police Officers Christine Kelliher ("Kelliher") and David Nieves ("Nieves") observed the plaintiff proceed through a red light on Street Road, and the officers pursued the plaintiff's vehicle. Id. ¶ 17. The plaintiff, driving "in an erratic manner, . . . collided with another vehicle that was stopped at a red light." Id. ¶ 18. Although the plaintiff was "unarmed and posed no threat to Kelliher and Nieves," id., Kelliher removed the plaintiff from her car and "violently and forcibly grabbed plaintiff on or around plaintiff's

neck." Id. ¶ 19. "[I]n an attempt to protect herself from the unprovoked attack," the plaintiff returned to her vehicle and fled the scene. Id. ¶ 20. The plaintiff proceeded "east in the westbound lanes of Street Road, eventually maneuvering around oncoming traffic and making a left turn into the Wawa Food Store located at Street Road and Kingston Way." Id.

Kelliher, Nieves, Bensalem Township Police Officer Andrew Aninsman ("Aninsman"), Bensalem Township Police Sergeant William Koszarek ("Koszarek"), and Bensalem Township Police Captain Robert DeChant ("DeChant") surrounded the plaintiff's vehicle in the Wawa parking lot. Id. ¶ 21. While the plaintiff remained in her car, Koszarek fired five rounds of bullets and Nieves fired three rounds of bullets into plaintiff's vehicle. Id. ¶¶ 22, 23, 24. Plaintiff was "shot and struck in the face and seriously injured by the bullets." Id. ¶ 24. More specifically, the plaintiff suffered gunshot wounds to the left and right sides of her face, and to her right index finger. Id. ¶ 25. Further, the plaintiff experienced several medical complications as a result of her injuries. Id. ¶ 25.

On June 5, 1997, the plaintiff filed the instant suit, naming the following parties as defendants: (1) Bensalem Township ("Bensalem"); (2) Frank Friel ("Friel"), Bensalem's Chief of Police; (3) DeChant; (4) Aninsman; (5) Kelliher; (6) Koszarek; and (7) Nieves. In her Complaint, plaintiff asserts numerous causes of

action that can be divided into two categories: (1) violations of her civil rights pursuant to 42 U.S.C. § 1983; and (2) various pendant state law tort claims.[1] On July 2, 1997, the defendants filed the instant motion to dismiss, claiming that the plaintiff has failed to state a claim upon which relief can be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6).

II. DISCUSSION

A. Rule 12(b)(6) Motions

Federal Rule of Civil Procedure 8(a) requires that a plaintiff's complaint set forth "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Fed. R. Civ. P. 8(a)(2). Accordingly, the plaintiff does not have to "set out in detail the facts upon which he bases his claim." Conley v. Gibson, 355 U.S. 41, 47 (1957) (emphasis added). In other words, the plaintiff need only "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Id. (emphasis added).

When considering a motion to dismiss a complaint for failure to state a claim under Federal Rule of Civil Procedure

1. The plaintiff alleges that the defendants' conduct violates section 1983, under the Fourth, Fifth, Eighth and Fourteenth Amendments (Count I). Moreover, the plaintiff has asserted claims for Civil Conspiracy (Count II), Negligence (Count III), Assault and Battery (Count IV), and Intentional Infliction of Emotional Distress (Count V).

12(b)(6),\[2] this Court must "accept as true the facts alleged in the complaint and all reasonable inferences that can be drawn from them. Dismissal under Rule 12(b)(6) . . . is limited to those instances where it is certain that no relief could be granted under any set of facts that could be proved." Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990) (citing Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988)); see H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249-50 (1989). The court will only dismiss the complaint if "'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" H.J. Inc., 492 U.S. at 249-50 (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)).

B. Applying the Rule 12(b)(6) Standard

In the present motion, the moving defendants have raised five general issues. First, they assert that the plaintiff has failed to plead a cause of action under Section 1983 for violations of the Fifth, Eighth, and Fourteenth Amendments. Second, the moving defendants argue that with respect to Friel, DeChant, Aninsman and Kelliher, the plaintiff has failed to plead adequately a federal cause of action under section 1983 for violations of the

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2. Rule 12(b)(6) provides that:

> Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted . . . .

Fed. R. Civ. P. 12(b)(6).

plaintiff's Fourth Amendment rights. Third, they contend that all pendent state law claims asserted against Bensalem are barred by governmental immunity. Fourth, they assert that the remaining defendants are immune from civil liability on the state law claims based upon negligence. Fifth, the moving defendants argue that Friel, DeChant, Aninsman, and Kelliher are immune from civil liability on the other state law claims based upon governmental immunity.

1. The Section 1983 Claim Based Upon Violations of the Fifth, Eighth and Fourteenth Amendments

The defendants contend that this case is "basically a Fourth Amendment Excessive Force 42 U.S.C. § 1983 claim." Defs.' Mem. at 3. Thus, the defendants conclude that the Section 1983 claims asserting violations of the plaintiff's Fifth, Eighth, and Fourteenth Amendments should be dismissed. Id. The plaintiff concedes this issue, and agrees that her claims should be dismissed on these points. Pl.'s Mem. at 5. Accordingly, this Court dismisses Count I, as it relates to Fifth, Eighth, and Fourteenth Amendment violations.

2. The Section 1983 Claim Based Upon Violation of the Fourth Amendment

In its complaint, the plaintiff supports its Section 1983 claim against Bensalem by alleging that Bensalem had a custom or policy that caused the violation of the plaintiff's Fourth

Amendment rights. Moreover, the plaintiff alleges that Friel's and DeChant's unlawful conduct in their roles as supervisors gives rise to her Section 1983 claim. The plaintiff also asserts Section 1983 claims against Kelliher, Koszarek, and Nieves, based on their alleged use of excessive force. Finally, the plaintiff claims that the failure by DeChant, Aninsman and Kelliher to stop Koszarek's and Nieves' use of excessive force gives rise to a separate Section 1983 claim for violations of the Fourth Amendment.

a. Supervisory Liability: Friel and DeChant

To prevail in a Section 1983 suit against a supervisory official, a plaintiff may not predicate the defendants' liability solely on a theory of respondeat superior. Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988) (citing Parratt v. Taylor, 451 U.S. 527, 537 n.3 (1981), overruled on other grounds by, Daniels v. Williams, 474 U.S. 327 (1986)); Hampton v. Holmesburg Prison Officials, 546 F.2d 1077, 1081 (3d Cir. 1976). Instead, she must demonstrate that the supervising defendants had personal involvement in the alleged wrongs. Andrews v. City of Philadelphia, 895 F.2d 1469, 1478 (3d Cir. 1990) (citing Rizzo v. Goode, 423 U.S. 362, 377 (1976)); Rode, 845 F.2d at 1207 (citations omitted). This "necessary involvement can be shown in two ways, either 'through allegations of personal direction or of actual knowledge and acquiescence,' or through proof of direct [action] by the supervisor. The existence of an order or acquiescence leading

to [the violation] must be pled and proven with appropriate specificity." Andrews, 895 F.2d at 1478 (quoting Rode, 845 F.2d at 1207). Moreover, the plaintiff may not premise the defendants' liability upon negligence. Daniels, 474 U.S. at 328.

In their motion, the defendants concede that the plaintiff has sufficiently pled a Section 1983 cause of action against Bensalem under the required Monell analysis. See Monell v. Department of Soc. Servs., 436 U.S. 658 (1978) (discussing standard for local government entity to be held liable under Section 1983). The defendants contend, however, that the claims asserted against Friel and DeChant are "duplicative . . . of the claim . . . asserted against Bensalem," and should therefore be dismissed. Defs.' Mem. at 3. This argument is not persuasive, because a local government and its supervising officers may both be liable in a Section 1983 case. See Andrews, 895 F.2d at 1481 (discussing supervisor's and city's liability). Moreover, the plaintiff has alleged that Friel and DeChant knew about the alleged improper conduct and allowed it to continue. Pl.'s Compl. ¶¶ 39, 40, 41, 43. Accordingly, the plaintiff has sufficiently pled Count I, as it relates to Friel and DeChant.

Although the defendants fail to raise this point, the plaintiff pleads that, alternatively, Friel's and DeChant's negligence gives rise to her Section 1983 claim against them. Under section 1983, a plaintiff may not premise these defendants'

liability upon negligence. Daniels, 474 U.S. at 328. Therefore, Count I is dismissed as it relates to Friel's and DeChant's negligent supervision.

b. Use of Excessive Force: Kelliher

The test to determine whether a use of force violates the Fourth Amendment queries whether the police officer's use of force was objectively reasonable in light of the facts and circumstances that confronted the officer at the time of his or her action. Graham v. Connor, 490 U.S. 386, 396-97 (1989).

> In Graham, the Supreme Court held that: Because "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," Bell v. Wolfish, 441 U.S. 520, 559, 99 S.Ct. 1861, 1884, 60 L.Ed.2d 447 (1979), however, its proper application requires careful attention to the facts and circumstances of the particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to avoid arrest by flight. See Tennessee v. Gardner, 471 U.S. [1], 8-9, 105 S.Ct. [1694], 1699-1700 [(1985)] (the question is "whether the totality of the circumstances justifie[s] a particular sort of . . . seizure").
>
> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable Officer on the scene, rather than with the 20/20 vision of hindsight. . . . With respect to a claim of excessive force, the standard of reasonableness at the moment applies. . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the

> amount of force that is necessary in a particular situation.

Id. at 396-97. Although the standard applicable under the Fourth Amendment is "'not capable of precise definition or mechanical application,'" it is clearly established that an officer may discharge his weapon during the course of a lawful arrest when the suspect is resisting arrest or pointing a gun at another officer, or when the suspect discharges his weapon and poses a clear threat to the officer's safety. Id. (quoting Bell, 441 U.S. at 559).

In the present case, taking the alleged facts as true, it is clear that an officer in Koszarek's or Nieves's position could not have believed that his or her conduct comported with clearly established Fourth Amendment principles. Accordingly, the defendants do no dispute that the excessive force allegations against those two defendant are sufficient to withstand a motion to dismiss.

The defendants contend, however, that only Koszarek and Nieves can be liable for use of excessive force under Section 1983, because they "are alleged to be the 'shooters.'" Defs.' Mem. at 3. However, the defendants fail to recognize that Kelliher allegedly "violently and forcibly grabbed plaintiff on or around plaintiff's neck," Pl.'s Compl. ¶ 19, after the plaintiff collided with another vehicle. Kelliher allegedly acted before the plaintiff fled the scene, and after the plaintiff merely caused a traffic accident. Taking the facts alleged in the complaint as true, Kelliher's

conduct was not objectively reasonable. Accordingly, the Court finds that Count I is not dismissed from the complaint, as it relates to Kelliher's use of excessive force under the Fourth Amendment.

c. Failure to Intervene and Prevent the Use of Excessive Force: Kelliher, Aninsman and DeChant

Where "a police officer, whether supervisory or not, fails or refuses to intervene when a constitutional violation such as an unprovoked beating takes place in his presence, the officer is directly liable under § 1983." Skevofilax v. Quigley, 586 F. Supp. 532, 543 (D.N.J. 1984). More specifically, if a police officer is present when another officer violates a citizen's constitutional rights, the first officer is liable under section 1983 if: "that officer had reason to know that excessive force was being used . . . and that officer had a realistic opportunity to intervene and prevent the harm from occurring." Jackson v. Mills, No.CIV.A.96-3751, 1997 WL 570905, at * 5 (E.D. Pa. Sept. 4, 1997) (citations omitted).

In the instant case, the plaintiff contends that DeChant, Aninsman, and Kelliher are liable under Section 1983 for allowing Koszarek and Nieves use of excessive force on the plaintiff. However, the plaintiff fails to plead an adequate claim for two reasons. First, the plaintiff has not alleged that DeChant, Aninsman or Kelliher were in the vicinity of Koszarek or Nieves,

and thus able to stop them from shooting. Second, the plaintiff has not alleged that DeChant, Aninsman or Kelliher knew that Koszarek or Nieves were using unlawful force. Accordingly, Count I is dismissed as it relates to these officers' failure to prevent the excessive force used against the plaintiff.

3. The State Law Tort Claims

Pursuant to Pennsylvania's Political Subdivision Torts Claim Act (hereinafter "PSTCA"), local governments and its officials are generally immune from civil liability for state law tort claims. See 42 Pa. C.S.A. §§8541, 8545.[3] Section 8550 of the PSTCA provides an exception to this general rule of immunity when a governmental employee causes an injury and that "act constituted a crime, actual fraud, actual malice or willful misconduct . . . ." 42 Pa. C.S.A. §8550. Under this provision, the immunity of the governmental employee that caused the injury is eliminated. The immunity of the local government, however, is not abolished even if the requirements of section 8550 are satisfied. See Parsons v. City of Philadelphia Coordinating Off. of Drug & Alcohol Abuse, 833 F. Supp. 1108, 1118 (E.D. Pa. 1993); Paul v. John Wanamakers, Inc., 593 F. Supp. 219, 223 (E.D. Pa. 1984)(citing Buskirk v. Seiple, 560

3. A local government, however, may be held liable under a limited set of circumstances under the PSTCA. Section 8542(b) sets forth eight (8) narrow exceptions to a local government's general grant of immunity -- i.e., (1) vehicle liability; (2) the care, custody and control of personal property; (3) the care, custody, and control of real property; (4) trees; traffic controls and street lighting; (5) utility service facilities; (6) streets; (7) sidewalks; and (8) the care, custody and control of animals. 42 Pa. C.S. § 8542(b). None of these exceptions, however, apply to the present case.

F. Supp. 247, 252 (E.D. Pa. 1983); Petula v. Mellody, 631 A.2d 762, 765 (Pa. Cmwlth. 1993) (explaining that Section 8550 of the PSTCA does not permit the imposition of liability on a local agency for the willful misconduct of its employees).[4]

In the present motion, the moving defendants contend that: (1) all state law claims asserted against Bensalem should be dismissed; (2) all state law claims based on negligence must be dismissed; and (3) only Koszarek and Nieves can be liable for the remaining state law claims. The defendants argue that the plaintiff cannot maintain these claims pursuant to the PSTCA. Defs.' Mem. at 4. For purposes of clarity in addressing these State law claims, this Court will separate the various Counts in the Complaint into two categories: (a) claims against Bensalem; and (b) claims against the individual defendants.

a. Claims Against Bensalem

In Counts II, III, IV and V, the plaintiff has asserted State law claims for liability based on: (1) Bensalem's own negligent and intentional acts, and (2) negligent acts, willful and wanton acts, and intentional torts allegedly committed by Bensalem employees, under the theory of respondeat superior. In this case, none of the alleged acts of negligence by Bensalem employees fall

4. Section 8550 only abrogates application of the PSTCA sections that address official liability, official immunity, indemnity, and limitation on damages. 42 Pa. C.S.A. §8550.

within one of the eight exceptions to the PSTCA. Moreover, even if these alleged acts actually constitute "a crime, actual fraud, actual malice or willful misconduct . . .," 42 Pa. C.S.A. §8550, Bensalem would still be immune from liability for such acts under the PSTCA. Counts II, III, IV and V are therefore dismissed, as they relate to Bensalem.

b. Claims Against Bensalem Employees

In Count II, the plaintiff alleges that Friel and DeChant maliciously and intentionally conspired to conceal Bensalem's Fourth Amendment violations, which led to Bensalem's pattern of unlawful conduct. Section 8550 of the PSTCA provides an exception to the general rule of immunity when a governmental employee causes an injury and that "act constituted . . . actual malice or willful misconduct . . . ." 42 Pa. C.S.A. §8550. Taking the allegations within the plaintiff's complaint as true, the plaintiff successfully asserts a valid claim against Friel and DeChant. However, the plaintiff also claims that Aninsman, Koszarek, Kelliher, and Nieves are liable for Civil Conspiracy, although the plaintiff fails to allege that these defendants committed acts which would support such a claim. Accordingly, Count II is dismissed as it relates to Aninsman, Koszarek, Kelliher, and Nieves.

In Count III, the plaintiff alleges that she has suffered damages as a result of several instances of the defendants'

negligence. These claims do not fall within the exceptions to the PSTCA. Thus, the defendant employees are immune from liability on these claims under the PSTCA and, therefore, Count III will be dismissed.

In Counts IV, and V, the plaintiff has asserted claims against Friel, DeChant, Aninsman, Kelliher, Koszarek, and Nieves for Assault and Battery and Intentional Infliction of Emotional Distress, respectively. In these Counts, the plaintiff alleges that the conduct of the Bensalem Employees was executed with actual malice or willful misconduct. However, the plaintiff asserts that only Kelliher, Koszarek and Nieves committed the assault and battery. Pl.'s Compl. ¶¶ 54-57. Accordingly, Count IV is dismissed as it relates to Friel, DeChant and Aninsman. Moreover, the plaintiff bases her intentional infliction of emotional distress claim on the same facts supporting her other intentional tort Counts. As explained above, the plaintiff fails to allege that Aninsman committed any intentional torts. Thus, Count V is dismissed as it relates to Aninsman.

An appropriate Order follows.

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O R D E R

AND NOW, this 11th day of December, 1997, upon consideration of the Defendants' Motion to Dismiss (Docket No. 4), IT IS HEREBY ORDERED that the Defendants' Motion is **GRANTED in part and DENIED in part**.

IT IS FURTHER ORDERED that:

(1) Count I of the Plaintiff's Complaint is dismissed as it relates to the defendants' alleged Fifth, Eighth, and Fourteenth Amendment violations, as it relates to the failure by the defendants to prevent the use of excessive force, and as it relates to defendant Aninsman;

(2) Count II of the Plaintiff's Complaint is dismissed only as it related to defendant Bensalem Township, Defendant Aninsman, Defendant Kelliher, Defendant Koszarek, and Defendant Nieves;

(3) Count III of the Plaintiff's Complaint is dismissed with prejudice;

(4) Count IV of the Plaintiff's Complaint is dismissed only as it relates to defendant Bensalem Township, Defendant Friel, Defendant DeChant, and Defendant Aninsman;

(5) Count V of the Plaintiff's Complaint is dismissed only as it relates to defendant Bensalem Township and defendant Aninsman; and

(6) All claims against Defendant Aninsman are dismissed with prejudice.

BY THE COURT:

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HERBERT J. HUTTON, J.